

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**April 1, 2003**

**IN RE:**

**GENERIC DOCKET TO CONSIDER  
TECHNOLOGY ADVANCES**

**DOCKET NO. 02-00434**

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**REPORT AND RECOMMENDATION**

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The Pre-Hearing Officer hereby respectfully submits this Report and Recommendation to Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Pat Miller of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this Docket.

**Background**

The Authority opened Docket No. 97-01262, *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements* (the "Permanent Prices Docket") in 1997 upon the filing of a petition by BellSouth Telecommunications, Inc. ("BellSouth" or "BST") for the purpose of "establish[ing] cost-based prices for interconnection and unbundled network elements ('UNEs')."<sup>1</sup> In its January 25, 1999 *Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements* in the Permanent Prices

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<sup>1</sup> *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements* (hereinafter the "Permanent Prices Docket"), Docket No. 97-01262, *Final Order*, pp. 1-2 (February 23, 2001).

Docket, the Authority addressed the issue of technology advances under Issue 7: "How should network maintenance expense be calculated for determining UNE prices?"<sup>2</sup> This Order stated:

Plant specific expense accounts are used in both models to develop the maintenance costs to be included in the UNE prices. Plant specific accounts include most of the expenses for maintaining the telephone network. Due to technological advances, the direct and indirect costs of maintaining the telephone network have declined over the past ten (10) years and are expected to do so in the future. BST has been able to reduce its workforce, at least in part, as a result of increased automation in network maintenance. For example, a BST employee can test for trouble on a subscriber's loop without ever having to leave his or her office. All of the parties agree that this type of productivity should be reflected in the forward-looking costs of UNEs. Therefore, the Authority must determine a reasonable level of productivity to include in the calculation of UNEs.

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Based on the evidence presented, the Authority adopts BST's normalized 1996 plant specific expense less 22.5% for calculating the maintenance expense to be included in the UNE cost in all models, including the nonrecurring and collocation models where appropriate. This 22.5% figure represents a decline in the plant specific expense of 7% compounded for a three (3) year period. This three (3) year time period is comparable to the time period proposed by BST in its model. Additionally, 7% is comparable to the productivity adjustment required by the FCC in its price cap regulation of incumbent local exchange carriers.<sup>3</sup>

The Authority ordered that "BST's normalized 1996 plant specific expenses shall be reduced by 22.5% for calculating the maintenance expense to be included in the UNE costs in all models, including the nonrecurring and collocation models where appropriate."<sup>4</sup>

The Authority restated this directive in its November 3, 1999 *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I*, which stated:

Based upon further review, however, the Authority finds that the 7% annual productivity adjustment proposed by AT&T witness Lerma only applies to the network operations expenses, not plant specific expenses. Therefore, the record does not support applying the productivity adjustment to all plant specific accounts.

The Authority finds that the record supports modification of its decisions on this issue. Upon reconsideration, the Authority finds that only network

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<sup>2</sup> Permanent Prices Docket, *Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements*, p. 15 (January 25, 1999).

<sup>3</sup> *Id.*, pp. 15-17.

<sup>4</sup> *Id.*, p. 38.

operations expense accounts in the TELRIC model be reduced by 22.5 percent (22.5%) consistent with Mr. Lerma's testimony. Therefore, BellSouth's proposed plant specific expenses in the model should not be adjusted.<sup>5</sup>

BellSouth filed the *Response of BellSouth Telecommunications, Inc.* on October 2, 2000, in response to comments by the Directors comments at the August 29, 2000 Authority Conference. With regard to "New Technology," BellSouth stated:

As [sic] its August 29, 2000 Directors' Conference, the Authority directed BellSouth to explain why BellSouth's revised cost studies "did not include any new technology which is available to it and in use in other states with its filing in June." Aug. 29, 2000 Tr. at 8. BellSouth's revised cost studies reflect the forward-looking technology that was available when BellSouth's cost studies were developed three years ago, and incorporating "new technology" into these studies cannot reasonably be implemented without starting the cost modeling process completely anew.

The issue of incorporating "new technology" was raised by AT&T, which insisted that BellSouth's revised cost studies should have assumed that "all (100%) DLC loops are served by IDLC" and that all BellSouth's IDLC loops are served by GR303. AT&T Comments at 3 (emphasis in original). The Authority rejected this argument, but held that, "[t]o the extent that BellSouth presents new technology in other venues, it has, as articulated in the Authority's interim order, a responsibility to include that technology [in] studies filed in Tennessee." April 25, 2000 Tr. at 13-14.

The only "new technology" that BellSouth has presented in cost studies in other venues is through its new BellSouth Telecommunications Loop Model© (or "BSTLM"), which has been filed in Florida and Louisiana and will soon be filed in Alabama and Kentucky. This model was developed incorporating the best methods and techniques of the existing cost models while incorporating next-generation modeling techniques. The BSTLM is truly the "next generation" loop model, designed to ensure that: (1) the results accurately reflect BellSouth's engineering practices; (2) it incorporates all of BellSouth's geocoded customer and network data; (3) it provides results for most required services and unbundled network elements; (4) it does not rely on sampling techniques; and (5) the results can support geographic de-averaging of costs. The BSTLM includes the latest technology, including the deployment of GR303 IDLC systems.

BellSouth did not understand that the Authority expected, let alone directed, that BellSouth file a new loop model in this proceeding, particularly since the only thing standing in the way of concluding this docket is the adoption of "just and reasonable rates" as required by the Telecommunications Act of 1996. The filing of a new cost model would require that the Authority start the rate-making process all over again.

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<sup>5</sup> Permanent Prices Docket, *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I*, p. 18 (November 3, 1999).

AT&T continues to insist that “[i]n its Georgia cost studies, BellSouth made changes to reflect the advance of forward-looking technology” by revising “its assumptions concerning the cost and capacity of digital loop carrier equipment.” AT&T Comments on Revised BellSouth Cost Studies at 5.<sup>6</sup> AT&T never identifies the “advance of forward-looking technology” BellSouth allegedly incorporated into its Georgia cost studies. While BellSouth did revise its assumptions concerning the cost of DLC systems, such revisions were simply a timing function. BellSouth filed its Georgia cost studies earlier this year, whereas BellSouth’s cost studies in this proceeding were originally filed three years earlier. It would have made little sense for BellSouth to incorporate in a 2000 cost study in Georgia DLC costs from 1997 or even earlier. While BellSouth could have filed updated DLC costs in its revised cost studies in this proceeding, the Authority did not direct that BellSouth do so. Furthermore, if BellSouth were to file updated DLC costs, there is no logical reason why all material prices should not be updated as well, including those material prices that have increased since BellSouth originally filed its cost studies in Tennessee. Again, this would have been the equivalent of starting the rate-making process over again, which BellSouth did not believe was the Authority’s intent at this late stage of the proceeding.<sup>7</sup>

In its *Second Interim Order Re: Revised Cost Studies and Geographic Deaveraging*, issued on November 22, 2000 in the Permanent Prices Docket, the Authority stated:

The Authority’s directive in its January 25, 1999 First Interim Order that “prices should be established using the forward-looking economic cost methodology as defined by the FCC’s TELRIC methodology,”<sup>8</sup> places a fiduciary responsibility on all parties, CLEC and ILEC alike, to ensure that the methodology adopted is populated only with those costs that reflect the least cost and most efficient technology. To the extent that BellSouth presents new technology in other venues, it has, as articulated in the First Interim Order, a responsibility to include that technology in cost studies filed in Tennessee. The Authority’s Phase I decisions in this proceeding would lack the desired effect were BellSouth not required to do so.<sup>9</sup>

In a footnote accompanying this passage, the Authority stated:

The Authority contemplates having to make a number of continuing adjustments before this proceeding is concluded. Consequently, the Authority’s Phase I decisions, coupled with the parties’ compliance therewith, can aid in

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<sup>6</sup> BellSouth is actually quoting from *AT&T’s Comments on Revised BellSouth Cost Studies*, p. 11 (January 20, 2000).

<sup>7</sup> Permanent Prices Docket, *Response of BellSouth Telecommunications, Inc.*, pp. 4-6 (October 2, 2000).

<sup>8</sup> *First Interim Order*, (January 25, 1999) p. 8 (Footnote in original).

<sup>9</sup> *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish “Permanent Prices” for Interconnection and Unbundled Network Elements*, Docket No. 97-01262, *Second Interim Order Re: Revised Cost Studies and Geographic Deaveraging*, 9-10 (November 22, 2000).

economically and beneficially reducing the iterations necessary to achieve permanent prices in Tennessee, thus advancing a competitive environment.<sup>10</sup>

In its *Third Interim Order Re: BellSouth's Revised Cost Studies*, issued on January 4, 2001, the Authority stated that at the April 25, 2000 Authority Conference the Authority ordered BellSouth to make adjustments to its TELRIC Calculator Model "to include any new, least cost and most efficient technology available to BellSouth and reflected in its cost studies in other states."<sup>11</sup> The Authority also stated, with regard to "[t]echnological advances reflected in BellSouth's cost studies in other states":

The Authority finds that BellSouth failed to include in its revised cost studies in Tennessee those technological advances that were reflected in BellSouth's cost studies filed in Georgia. By failing to address this issue in its June 9, 2000 filing, BellSouth defeats the purpose of using a forward-looking cost methodology like TELRIC to set UNE rates. TELRIC-based rates must reflect the forward-looking costs for an incumbent local exchange carrier ("ILEC") to furnish to a competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use, including any system or component upgrade that the ILEC chooses to increase its own efficiency.<sup>12</sup> As such, consistent with the Authority's decisions on April 25, 2000, the Authority orders BellSouth to comply with the Authority's previous decisions and include in Tennessee cost studies any new technology that has been included in similar cost studies that BellSouth has filed in other states.<sup>13</sup>

In its Final Order, issued on February 23, 2001, the Authority stated:

BellSouth claims that "incorporating 'new technology' into [its] studies cannot reasonably be implemented without starting the cost modeling process completely anew."<sup>14</sup> BellSouth states that the Authority rejected AT&T's argument that BellSouth should assume that all DLC loops are served by IDLC using GR303 instead of TR008 technology. BellSouth maintains that the only "new technology" it presented in other states "is through its new BellSouth Telecommunications Loop Model<sup>®</sup> (or "BSTLM"), which has been filed in Florida and Louisiana and will soon be filed in Alabama and Kentucky."<sup>15</sup>

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<sup>10</sup> *Id.*, p. 10, n. 16.

<sup>11</sup> Permanent Prices Docket, *Third Interim Order Re: Revised Cost Studies and Geographic Deaveraging*, p. 2 (January 4, 2001).

<sup>12</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 751 (8<sup>th</sup> Cir. 2000) (Footnote in original).

<sup>13</sup> Permanent Prices Docket, *Third Interim Order Re: Revised Cost Studies and Geographic Deaveraging*, pp. 6-7 (January 4, 2001).

<sup>14</sup> *BellSouth's Response to the Authority*, Oct. 2, 2000, p. 5. (Footnote in original).

<sup>15</sup> *Id.* at 5. (Footnote in original).

BellSouth maintains that the BSTLM is the “next generation” loop model and encompasses the latest technology, including “the deployment of GR303 IDLC systems.”<sup>16</sup> Finally, BellSouth also argues that the filing of a new cost model would require restarting the rate-making process.<sup>17</sup> BellSouth claims that it did not believe this was the TRA’s intent at this late stage of this proceeding because the Authority is close to adopting “just and reasonable rates” as required by the Act.

In the *First Interim Order*, the Authority ordered that “prices should be established using the forward-looking economic cost methodology as defined by the FCC’s TELRIC methodology.”<sup>18</sup> The Authority later found that this directive, as restated in the Authority’s *Second Interim Order*,

places a fiduciary responsibility on all parties, CLEC and ILEC alike, to ensure that the methodology adopted is populated only with those costs that reflect the least cost and most efficient technology. To the extent that BellSouth presents new technology in other venues, it has, as articulated in the First Interim Order, a responsibility to include that technology in cost studies filed in Tennessee.<sup>19</sup>

The Authority finds that as telecommunications technology improves, the direct and indirect costs of maintaining the telephone network may continue to decline over time. At the same time, ILECs and CLECs should continue to adjust their operations in a manner consistent with advances in technology, leading to less and less manual-related costs and more automation-related costs. Over time, telecommunications network expenses should decrease. The Authority does not find support for BellSouth’s assertion that new technology cannot be incorporated into its studies without beginning anew the cost modeling process. The Authority finds that BellSouth can adjust its inputs, work times, fallout, and split between electronic and manual processing without completely starting the modeling process anew. **Nevertheless, because the Authority finds that the process of incorporating technology advances may be cumbersome and delay establishing permanent prices for unbundled network elements, the Authority determines to convene a new generic proceeding to consider technology advances and geographic deaveraging.**<sup>20</sup>

The Authority opened this docket in accordance with the *Final Order* entered on February 23, 2001, in the Permanent Prices Docket.<sup>21</sup> At the May 1, 2001 Authority Conference, the Directors voted unanimously to appoint General Counsel or his designee to act as Pre-

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<sup>16</sup> *Id.* (Footnote in original).

<sup>17</sup> *Id.* at 6. (Footnote in original).

<sup>18</sup> *First Interim Order*, Jan. 25, 1999, p.8. (Footnote in original).

<sup>19</sup> *Second Interim Order*, Nov. 22, 2000, p. 10. (Footnote in original).

<sup>20</sup> Permanent Prices Docket, *Final Order*, pp. 9-11 (February 23, 2001) (Emphasis provided).

<sup>21</sup> *See id.*, pp. 10-11.

Hearing Officer for the purposes of determining the scope of this Docket, establishing a procedural schedule to completion, and disposing of all preliminary matters.

On March 13, 2002, the Pre-Hearing Officer submitted a *Report and Recommendation* to the Directors recommending that Docket No. 01-00339 be retained as the docket on geographic deaveraging and that a new docket be opened to address technology advances.<sup>22</sup> On April 16, 2002, during a regularly scheduled Authority Conference, the Directors unanimously accepted the Pre-Hearing Officer's March 13, 2002 *Report and Recommendation*.<sup>23</sup> Docket No. 02-00434 was opened for consideration of technology advances.

On April 26, 2002, the Pre-Hearing Officer issued a *Notice of Filing* directing interested persons and entities who wished to file comments on the scope of this docket to do so by May 24, 2002. The notice further instructed:

Such comments should contain: (1) a list of those Unbundled Network Element ("UNE") rates from Docket No. 97-01262, *In re: Petition of BellSouth Telecommunications Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, requiring review as a result of technology advances and (2) a list of UNEs for which an initial rate is needed as a result of technology advances. Each item listed shall include a detailed description of the technology advance impacting that item.<sup>24</sup>

On May 24, 2002, Sprint Communications Company, LP and United Telephone-Southeast, Inc. (collectively "Sprint/United"), BellSouth; MCI; Cinergy Communications Company ("Cinergy"); Birch Telecom, Inc. ("Birch"); DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"); AT&T Communications of the South Central States ("AT&T"); TCG MidSouth, Inc.; ITC^DeltaCom Communications, Inc.; MCImetro

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<sup>22</sup> See *In re: Generic Docket to Consider Technology Advances and Geographic Deaveraging*, Docket No. 01-00339, *Report and Recommendation* (March 13, 2002).

<sup>23</sup> See *In re: Generic Docket to Consider Geographic Deaveraging*, Docket No. 01-00339, and *Generic Docket to Consider Technology Advances*, Docket No. 02-00434, *Order Accepting Report and Recommendation* (May 13, 2002).

<sup>24</sup> *Notice of Filing* (April 26, 2002).

Access Transmission Services, LLC.; Brooks Fiber Communications of Tennessee, Inc.; Network Telephone Corporation; and NewSouth Communications Corp. (collectively the “Consolidated CLECs”) filed the *Consolidated CLEC Comments*. The Pre-Hearing Officer granted leave to intervene on May 24, 2002<sup>25</sup> for BellSouth and on June 7, 2002<sup>26</sup> for Sprint/United; MCI; Cinergy; Birch; Covad; and AT&T.

Upon review of the *Consolidated CLEC Comments*, the Pre-Hearing Officer issued an Order on June 13, 2002, which stated:

After considering these comments, the Pre-Hearing Officer finds that additional argument is needed to aid the Authority in developing a comprehensive list of the UNE rates to be fixed in this docket. Specifically, the Pre-Hearing Officer notes that the Consolidated CLECs’ arguments focus on advances impacting loops and switching, yet their list includes elements other than loops and switching. Therefore, it would be beneficial if the Consolidated CLECs were to supplement their comments by providing a detailed description of the technology advance impacting each item listed in the Attachment to the *Consolidated CLEC Comments* and describe in detail how that advance has reduced the cost of the item. In addition, responsive arguments would also aid the Authority in evaluating technology advances.<sup>27</sup>

The Pre-Hearing Officer directed the Consolidated CLECs to supplement their comments within thirty (30) days of the entry of the Order.

On June 28, 2002, the Consolidated CLECs filed a *Motion for Reconsideration* of the June 13, 2002 Order. The Consolidated CLECs argued that this Order was unreasonable in that it required the Consolidated CLECs to “prove their entire case before the Authority establishes the scope of the proceeding and determines what will be accomplished in the docket.”<sup>28</sup> On July 12, 2002, BellSouth filed the *Response of BellSouth Telecommunications, Inc. to CLECs’ Motion*

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<sup>25</sup> Order Granting Petition to Intervene (May 24, 2002).

<sup>26</sup> Order Granting Petitions to Intervene (June 7, 2002).

<sup>27</sup> Order, pp. 3-4 (June 13, 2002).

<sup>28</sup> Motion for Reconsideration, p. 3 (June 28, 2002).



*for Reconsideration*, requesting that the Pre-Hearing Officer deny the Consolidated CLECs' Motion for Reconsideration.

On July 8, 2002, the parties filed an *Agreed Motion Regarding Filing Deadlines During the Week of July 1<sup>st</sup> through July 5<sup>th</sup>, 2002*, requesting that the existing due dates be modified such that the responses to the *Motion for Reconsideration* would be due on July 12, 2002 and that supplemental comments would be due on July 19, 2002. On July 12, 2002, the Pre-Hearing Officer found that "good cause exists for the requested extensions and that the extensions will not unreasonably delay the outcome of this docket."<sup>29</sup> The Pre-Hearing Officer ordered responses to the *Motion for Reconsideration* to be filed on or before Friday, July 12, 2002, and suspended the deadline for supplementing the *Consolidated CLECs Comments* pending disposition of the *Motion for Reconsideration*.<sup>30</sup>

The Pre-Hearing Officer issued an Order on July 15, 2002, denying the Consolidated CLECs' *Motion for Reconsideration*. This Order stated:

The purpose of this docket is not to simply evaluate all UNE rates without a determination of whether those UNEs have been impacted by technology advances. If this were the case, there would be no need for the Authority to direct the Pre-Hearing Officer to determine the scope of this Docket.

The determination of the scope of this Docket is dependent on which UNEs will be evaluated. Because the purpose of this Docket is to evaluate those UNEs impacted by technology advances, it is necessary to determine which UNEs have been impacted by technology advances. The Pre-Hearing Officer finds that the June 13, 2002 Order reasonably requested that the CLECs provide additional information so that the scope of the Docket can be determined.<sup>31</sup>

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<sup>29</sup> Order, p. 2 (July 12, 2002).

<sup>30</sup> *Id.*, pp. 2-3.

<sup>31</sup> Order Denying Motion for Reconsideration, p. 4 (July 15, 2002).

The Pre-Hearing Officer ordered the Consolidated CLECs to file supplemental comments, if any, within fifteen (15) days of the filing of the order while ordering that responsive comments shall be filed within thirty (30) days of the filing of the order.<sup>32</sup>

On July 26, 2002, the CLEC Interveners<sup>33</sup> filed an *Agreed Motion for Continuance*. In this motion, the parties stated that “[b]ecause of the large number of filings in other TRA proceedings and the pending hearing in Docket 97-00309, (BellSouth’s 271 Application), the Interveners request that the July 30 filing be postponed for thirty days, until August 29, 2002, and that BellSouth be granted thirty (30) days to respond to that filing.”<sup>34</sup> During the August 19, 2002 Authority Conference, the panel unanimously approved the CLEC Interveners’ request.

Covad filed *Covad’s Supplemental Comments* on August 30, 2002. No other CLEC filed comments in response to the June 13, 2002 Order. In its comments, Covad stated that the Authority should “set initial rates for a new UNE that would allow CLECs to provision xDSL services through Tennessee Remote Terminals (‘RTs’) that BellSouth has equipped with various advanced technologies.”<sup>35</sup> Covad further stated:

The scope of this docket should include the proposed new UNE because developing technologies being deployed by BellSouth at its RTs in Tennessee are having a significant impact on the nature of competition in the state and are leading toward the gradual remonopolization of data services by the [sic] BellSouth.<sup>36</sup>

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<sup>32</sup> *Order Denying Motion for Reconsideration*, p. 5 (July 15, 2002). During the August 19, 2002 Authority Conference, the voting panel unanimously agreed to reappoint the Authority’s General Counsel or his designee as Pre-Hearing Officer, the original Pre-Hearing Officer no longer being available to serve in that capacity. Following this action, Jonathan N. Wike succeeded Julie M. Woodruff as Pre-Hearing Officer in this Docket.

<sup>33</sup> CLEC Interveners include the Consolidated CLECs and the Association of Communications Enterprises.

<sup>34</sup> *Agreed Motion for Continuance*, p. 1 (July 15, 2002).

<sup>35</sup> *Covad’s Supplemental Comments*, p. 1 (August 30, 2002).

<sup>36</sup> *Id.*

Covad set forth additional argument in favor of the creation of “an end-to-end Broadband UNE.”<sup>37</sup> On August 30, 2002, Covad filed the Testimony of Terry L. Murray in support of this position.

On September 30, 2002, BellSouth filed the *Responsive Comments of BellSouth Telecommunications, Inc.* BellSouth cited the Pre-Hearing Officer’s April 26, 2002 *Notice of Filing* and June 13, 2002 Order. Noting that the Consolidated CLECs did not file the requested list of UNEs as requested in these documents, BellSouth stated:

The time for the CLECs to file their supplemental comments in compliance with the *Order Denying Motion for Reconsideration* has come and gone. Not a single CLEC has filed any supplement Comments that contain *any* description of *any* technology advance that purportedly impacts *any* existing UNE. See June 13, 2002 Order at 3. Not a single CLEC has filed *any* supplemental Comments that describe how any purported technology advance has reduced the cost of *any* existing UNE. See *id.* At 3-4.

The CLECs may have abandoned their argument that technology advances warrant review of the rates for any existing UNE. Alternatively, the CLECs may have decided to simply ignore both the June 13, 2002 Order and the *Order Denying Motion for Reconsideration* (which they did not appeal) and simply rely on the bare-bones comments they originally filed (which the Pre-Hearing Officer has already found to be insufficient to aid the TRA in developing a comprehensive list of the UNE rates to be fixed in this docket). In either event, the Pre-Hearing Officer should exclude all existing UNEs from the scope of this docket.<sup>38</sup>

BellSouth further stated:

[T]he Pre-Hearing Officer should exclude all existing Unbundled Network Element (“UNE”) rates from the scope of this proceeding. Moreover, the Pre-Hearing Officer should exclude Covad’s request to establish an initial rate for an end-to-end broadband UNE from the scope of this proceeding because: the Tennessee Regulatory Authority . . . could not establish such an initial rate unless it first established the Digital Subscriber Line Access Multiplexers (“DSLAMs”) in BellSouth’s remote terminals as UNEs; Covad cannot make the “impairment” showing required by the federal Telecommunications Act of 1996 . . . in order for the TRA to declare those DSLAMs as UNEs; and the TRA is already addressing the issues presented by Covad’s request in other pending proceedings. Given that

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<sup>37</sup> *Id.*, p. 7.

<sup>38</sup> *Responsive Comments of BellSouth Telecommunications, Inc.*, pp. 4-5 (September 30, 2002).

no other matters need to be addressed in this docket, the Pre-Hearing Officer should recommend that the TRA close this docket.<sup>39</sup>

### **Recommendation**

The Authority established this docket to address “technology advances.” The Authority’s intention was to focus only on network architecture advances that would result in changes to the existing UNE rates established in the Permanent Price Docket.<sup>40</sup> The Authority directed the Pre-Hearing Officer to determine the scope of this Docket, and to accomplish this goal the Pre-Hearing Officer sought comments from the parties identifying specific “technological advances” that directly affected or impacted existing UNE rates. The clear and justified directives of the Pre-Hearing Officer did not elicit anything from the Consolidated CLECs that would assist in identifying such technology advances. While the Pre-Hearing Officer is sympathetic to the Consolidated CLECs’ assertion that they will be unable to identify affected UNEs without sufficient information from BellSouth, the Pre-Hearing Officer is of the opinion that the Consolidated CLECs could have provided a tentative list of affected UNEs based simply on commonly available information regarding the structure of telecommunications networks. For example, the Consolidated CLECs could have resolved the issue noted by the Pre-Hearing Officer in the June 13, 2002 Order: “Specifically, the Pre-Hearing Officer notes that the Consolidated CLECs’ arguments focus on advances impacting loops and switching, yet their list includes elements other than loops and switching.”<sup>41</sup> Nevertheless, the Consolidated CLECs did not provide any list or explanation as requested in the June 13, 2002 Order, and the lack of such information has hampered the Authority’s efforts in this Docket.

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<sup>39</sup> *Id.*, p. 1.

<sup>40</sup> In the Permanent Prices Docket, the Authority considered both the cost model and the inputs to the model.

<sup>41</sup> *Order*, p. 3 (June 13, 2002).

Instead, the Consolidated CLECs' comments throughout this proceeding have taken a more general approach that would effectively result in going beyond the scope of this docket. In the only comments filed pursuant to the Pre-Hearing Officer's June 13, 2002 Order, Covad did not address the Pre-Hearing Officer's request that the Consolidated CLECs address whether technology advances only affect loops and switching. Instead, Covad requested that the Authority designate an entirely new UNE. The Hearing Officer is of the opinion that establishing a new UNE goes beyond the intended scope of this Docket.<sup>42</sup> The Consolidated CLECs are essentially seeking to establish rates for new UNEs or re-establish existing UNE rates based on economic and methodological changes that occurred after closure of the Permanent Prices Docket.<sup>43</sup>

The Pre-Hearing Officer must also note that the purpose and apparent methodology of this Docket are potentially at odds with the Authority's approach to UNE prices in the Permanent Prices Docket. Changes in UNE prices to account for technology advances would inevitably be piecemeal, whereas the Authority established UNE prices on a comprehensive basis in the Permanent Prices Docket, considering the model and inputs simultaneously, and the Authority did so considering all factors that may affect determination of costs. Therefore, the potential product of this Docket may be incompatible with the product of the Permanent Prices Docket, as well as possibly difficult to implement and susceptible to challenge.

It is the Pre-Hearing Officer's opinion that the most prudent and practical course of action is to preserve the Authority's comprehensive approach to setting UNE prices and not to

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<sup>42</sup> Covad's request for designation of a new "Broadband UNE" in its August 30, 2002 *Supplemental Comments* certainly is not responsive to the Pre-Hearing Officer's directive in the June 13, 2002 *Order*.

<sup>43</sup> The Authority should be able to determine the most appropriate forum to address these issues after the FCC releases its Triennial Review Order in CC Docket 01-338, which should provide specific guidance on what action the state commissions should take to comply with Federal Law with regard to UNE prices.

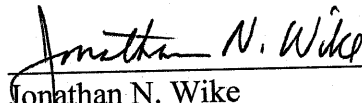
engage in an approach that is inherently fragmentary and would potentially create inconsistencies. Accordingly, the Pre-Hearing Officer recommends that the Authority close this Docket. Should the Authority close this Docket, the Authority could then, at any time, open a docket for consideration of UNE prices, and the Authority would be able to take a more comprehensive approach.

The Authority should not be unduly concerned that closing this Docket will somehow leave the Permanent Prices Docket incomplete. The prices set in the Permanent Prices Docket have served as prices for BellSouth UNEs and as part of the basis for the Authority's determination with regard to BellSouth's application to provide long distance service pursuant to 47 U.S.C. § 271. The setting of UNE prices is presumably an ongoing process. The Authority can resume this process at any time and is not bound to one particular approach. Closing this Docket should enhance this ongoing process by releasing the Authority and the parties in this Docket from a limited approach that has proved difficult to implement.

The Authority's action with regard to the BSTLM illustrates the difficulty in carrying this Docket forward. The Authority could have directed BellSouth to submit the BSTLM but did not. It may well be that the absence of the BSTLM in the record in this Docket will fatally inhibit the Authority's ability to determine those changes in costs that have resulted from technology advances. At the same time, were the BSTLM available it would likely show that some additional changes in the cost model approved by the Authority that were unrelated to technology advances had taken place since the final order was issued in the Permanent Prices Docket. It would then be necessary either to exclude those changes from further consideration in this Docket, an action inconsistent with the goal of the Permanent Prices Docket and one which would create inconsistencies among UNEs, or to construe the term "technology advances" in so

broad a manner as to render that term meaningless.<sup>44</sup> This situation has been magnified by the inability or reluctance of the Consolidated CLECs to identify coherently, and in a manner consistent with the Authority's directives in opening this Docket, those UNEs for which the cost has been affected by technology advances.

At the heart of the difficulties in proceeding with this Docket is the fact that technology advances, while potentially very important, do not cover all relevant changes that potentially could be made to the accepted cost model to ensure that it is least cost. The Authority recognized this in the *Final Order* in the Permanent Prices Docket when it found that "BellSouth can adjust its inputs, work times, fallout, and split between electronic and manual processing without completely starting the modeling process anew."<sup>45</sup> In this statement, the Authority acknowledged that changes other than those involving new technology are relevant to ensuring least cost UNE pricing. Stated differently, the Authority recognized that both the model and the inputs into the model require periodic revision in tandem. However, this Docket was created to address only the inclusion of "technology advances" in the UNE cost modeling process. To fully address the issue of costing UNEs, it is necessary to address both the technological properties of the model and the inputs. Separating consideration of the model from inputs to the model will likely prove an unsatisfactory and inefficient way to address costing of network elements, and it would appear to be inconsistent with the Authority's general methodology in the Permanent Prices Docket.

  
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<sup>44</sup> Excluding obvious but non-technology related changes in costs would prevent the Authority from arriving at the least-cost UNE prices in a situation where information was available that would allow the Authority to do so. This is contrary to the aim of the Permanent Prices Docket.

<sup>45</sup> Permanent Prices Docket, *Final Order*, p. 11 (February 23, 2001).